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Mary Brooke Lamson

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of the public airwaves. Nevertheless, the Court in *Cohen* rejected this justification for censorship. Freedom of speech, it said, also includes offensive speech, and putting up with the latter is the price that must be paid for the former.¹³⁹

The Court in *Miller* reaffirmed the holding in *Roth* that the first amendment does not protect obscene speech—a position that has been vigorously disputed on both sides.¹⁴⁰ Nevertheless, the Burger Court has shown no willingness to create another category of unprotected speech. *Rowan* demonstrated the Court's concern for the unconsenting adult, but the Court has elsewhere noted that "[t]he radio can be turned off"¹⁴¹ *Erznoznik* demonstrated that the goal of protecting children from offensive material will not be allowed to override the first amendment interests of adults. On the basis of these precedents, it seems unlikely that the FCC will be successful in its attempts to sanitize the language used in some of our most important public fora—the broadcast media.

JAMES M. LANE

Federal Jurisdiction—*Vendo Co. v. Lektro-Vend Corp.*: The Interface of the Clayton Act and the Anti-Injunction Act

In *Vendo Co. v. Lektro-Vend Corp.*,¹ the United States Supreme Court had, and failed to take advantage of, the opportunity to define more clearly the exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283,² which prohibits the enjoining of state court proceedings. Specifically, the Court had before it the issue whether section 16 of the Clayton Act,³ which

139. *Id.* at 24-26.

140. See generally Symposium, *Obscenity and the Law*, 28 HASTINGS L.J. 1275 (1977).

141. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)).

1. 97 S. Ct. 2881 (1977).

2. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970).

3. Clayton Act § 16, 15 U.S.C.A. § 26 (West Cum. Supp. 1977), provides in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue

provides private injunctive relief in federal courts against Sherman Antitrust Act⁴ violations, qualifies as an exception to the Anti-Injunction Act. In its attempt to construe section 2283, the Court became so embroiled in the language of the statute and the case law interpreting it that it all but ignored the policy behind the Act—"to prevent needless friction between state and federal courts."⁵ The ultimate determination of the issue in *Vendo* may reflect this policy, but the focus of the opinions raises the question whether section 2283 has become so mechanically applied that it has lost its effectiveness.

The case came before the federal courts⁶ when Lektro-Vend, Harry B. Stoner and Stoner Investments brought an antitrust action against Vendo. As part of that action, plaintiffs prayed that Vendo be temporarily enjoined from collecting a seven million dollar judgment granted it by the Illinois Supreme Court.⁷ Vendo had obtained the Illinois judgment in a suit brought against Stoner for breach of a covenant against competition in his employment contract.⁸ It was this restrictive covenant, along with the state court action to enforce it, that formed the basis of the alleged antitrust violation in Stoner's federal action.⁹ The district court granted the injunction, finding "evidence that Vendo had used litigation as a method of harassing and eliminating competition."¹⁰ The United States Court of Appeals for the Seventh Circuit affirmed.¹¹ Both courts held that section 16 of the Clayton

4. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

5. *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1939).

6. *Lektro-Vend Corp. v. Vendo Co.*, 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd*, 97 S. Ct. 2881 (1977).

7. *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

8. Vendo purchased Stoner Manufacturing Company from Harry B. Stoner and gave him a five year employment contract that included a ten year, world-wide restrictive covenant against competition. While employed by Vendo, Stoner, as an individual and through his company Stoner Investments, invested in the embryonic Lektro-Vend Corporation. Stoner's financial support and public backing of Lektro-Vend formed the basis of Vendo's state court action against Stoner. 403 F. Supp. at 530-31.

9. A peripheral aspect of the *Vendo* litigation was the question whether the federal antitrust laws can be asserted as an affirmative defense in the state courts. Lektro-Vend and Stoner tried to assert such a defense at the trial level in the Illinois courts; this defense was ordered stricken. *Lektro-Vend Corp. v. Vendo Co.*, 545 F.2d at 1054 n.4. Although this ruling was reversed on appeal, *Vendo Co. v. Stoner*, 105 Ill. App. 2d 261, 245 N.E.2d 263 (1969), Lektro-Vend and Stoner withdrew the defense in the second round of the state court litigation. 545 F.2d at 1054 n.4.

The jurisdiction of state courts to hear federal antitrust defenses has been a matter of some dispute. See Recent Cases, *State Court Denies Jurisdiction in Contract Action to Hear Defense of Illegality Based on Federal Antitrust Laws*, 46 MINN. L. REV. 1135 (1961). Justice Stevens, in his dissenting opinion and without any dispute from the majority, appears to have assumed that the state court did, indeed, have such authority. See 97 S. Ct. at 2904 (Stevens, J., dissenting).

Although this attitude on the part of the Court would appear to open up the state courts for the assertion of federal antitrust defenses, it may be of limited utility. State courts cannot accord full relief under the antitrust laws, *id.*, a fact that will probably encourage persons so aggrieved to continue to seek their remedies in the federal courts.

10. 403 F. Supp. at 534.

11. 545 F.2d 1050 (7th Cir. 1976).

Act was an "expressly authorized" exception to section 2283, when, as here, the state court action is itself part of the anticompetitive scheme.¹² The district court further held that the injunction was "necessary in aid of its jurisdiction," and therefore permissible under section 2283.¹³

The Supreme Court, in a splintered decision, reversed.¹⁴ Justice Rehnquist, writing the opinion of the Court in which two other justices joined,¹⁵ held that section 16 is not an "expressly authorized" exception to section 2283, and that the district court did not act "in aid of its jurisdiction."¹⁶ Justice Stevens wrote for the four dissenters¹⁷ who found section 16 injunctions to be expressly authorized exceptions to section 2283.¹⁸ Justice Blackmun and Chief Justice Burger conceded that section 16 can be an expressly authorized exception to section 2283, but cast the deciding votes denying the injunction¹⁹ on the ground that the bringing of the Illinois suit was not a violation of the Sherman Act.²⁰

12. *Id.* at 1055; 403 F. Supp. at 536. Before *Vendo*, few courts squarely faced the issue of whether § 16 is an exception to § 2283. A few lower courts have denied § 16 injunctions against state court actions, but they have generally done so on the grounds that the state action sought to be enjoined is not a violation of the Sherman Act. See *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974); *Red Rock Cola Co. v. Red Rock Bottlers, Inc.*, 195 F.2d 406 (5th Cir. 1952); *cf. Helfenbein v. International Indus., Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 879 (1971) (suggesting that had the state suit been an antitrust violation, the injunction would have been granted).

13. See note 2 *supra*. The district court held that collection of the judgment would place the two corporate plaintiffs under *Vendo*'s control, thereby eliminating the case or controversy. 403 F. Supp. at 535.

14. 97 S. Ct. 2881 (1977).

15. Justices Stewart and Powell.

16. 97 S. Ct. at 2893.

17. Justices Stevens, Brennan, White and Marshall.

18. 97 S. Ct. at 2898 (dissent).

19. The concurrence of Blackmun and Burger created an anomalous result. Six justices (Blackmun, Burger, Stevens, White, Marshall and Brennan) found § 16 to be an expressly authorized exception, and seven (Stevens, White, Marshall, Brennan, Rehnquist, Stewart and Powell) possibly conceded that the state court action could have been found to be a Sherman Act violation. The plurality opinion did not reach the question. See *id.* at 2889 n.6. But because of the three-way split, the injunction was struck down.

20. *Id.* at 2893-94 (Blackmun, J., concurring). Justice Blackmun's opinion relies on Supreme Court cases granting governmental dealings immunity. In *Eastern R.R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that political lobbying is not a Sherman Act violation, even if the political activity incidentally results in a restraint on trade. Individuals and groups have the right to petition and attempt to influence their government; the Sherman Act may not interfere with this political sphere. This immunity was extended in *UMW v. Pennington*, 381 U.S. 657 (1965), to include attempts to influence administrative officials, even with an anticompetitive intent.

In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court invoked the "sham" exception recognized by *Noerr* and limited the immunity. "[T]here may be instances where the alleged conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.'" *Id.* at 511 (quoting *Eastern R.R. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. at 144) (citation omitted). The Court distinguished the political campaign of *Noerr*, in which misrepresentation and unethical tactics are to be expected, and the bringing of litigation in *California Transport*: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513.

Justice Blackmun contended that the present action does not qualify as an exception to the

Congress enacted section 2283 as part of the Judiciary Act of 1793.²¹ The original provision allowed no exceptions on its face.²² This seemingly absolute prohibition did not prevent federal court judges from molding necessary modifications; injunctive relief under six federal statutes was universally accepted before 1941.²³ Federal courts were also willing to enjoin state cases involving the same res over which a federal court had first acquired jurisdiction,²⁴ state court judgments obtained by fraud,²⁵ and cases in which parties attempted to litigate issues in state court already decided in federal suits.²⁶

In a startling turnabout in 1941, Justice Frankfurter, in his opinion for the Court in *Toucey v. New York Life Insurance Co.*,²⁷ held that the statutory exceptions and the res exception were the only ones to be recognized by the federal courts.²⁸ Congress reacted to this change in judicial attitude by amending the statute²⁹ to except from the general prohibition those injunctions "expressly authorized by Act of Congress,³⁰ or where

immunity conferred under *California Transport* because "a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case." 97 S. Ct. at 2893 n.*. This is a narrow reading of *California Transport*. See *Associated Radio Serv. Co. v. Page Airways, Inc.*, 414 F. Supp. 1088 (N.D. Tex. 1976).

21. Ch. 22, § 5, 1 Stat. 334.

22. "[N]or shall a writ of injunction be [granted by any court of the United States] to stay proceedings in any court of a state . . ." *Id.*

23. These exceptions were bankruptcy, removal, limitation of shipowner's liability, interpleader, the Frazier-Lemke Farm-Mortgage Act, and habeas corpus proceedings. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 47, at 203 nn.31 & 32 (3d ed. 1976).

24. See *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

25. See *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920).

26. See *Julian v. Central Trust Co.*, 193 U.S. 93 (1904).

27. 314 U.S. 118 (1941), *rev'g on rehearing* 313 U.S. 538 (1940) (per curiam) (mem.).

28. *Id.* at 139. *Toucey* involved a question of relitigation. *Toucey* brought an action in state court against defendant insurance company in 1935 for reinstatement of his insurance policy on the ground that the company had fraudulently cancelled by concealing from *Toucey* a provision that if he were to become disabled, premiums were waived. *Toucey* claimed he was disabled in 1933 and that the company cancelled his policy for nonpayment of premiums. The case was removed to federal court on diversity grounds. The federal district court dismissed the action, finding that *Toucey* was not disabled. There was no appeal. *Id.* at 126-27.

In 1937, Shay, purporting to be *Toucey*'s assignee, brought the same action against the insurance company in the Missouri state courts. The insurance company brought an action in the federal district court to enjoin that action and any further actions by *Toucey* on the policy. The injunction was granted on the grounds that the federal court had already ruled against *Toucey* on the essential question of his purported disability. The district court held that the anti-injunction provision did not bar a federal injunction of state court actions when necessary to "effectuate the lawful decrees of the federal courts." *Id.* at 127. The Supreme Court, after initially affirming by an equally divided vote, 313 U.S. 538 (1940) (per curiam) (mem.), reversed on rehearing, holding the relitigation exception invalid. 314 U.S. at 139-41.

29. Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 869. The Reviser's Note indicates that the amendment "restores the basic law as generally understood and interpreted prior to the *Toucey* decision." 28 U.S.C. § 2283, Reviser's Note (1970).

30. 28 U.S.C. § 2283 (1970) (footnote added). *Lektro-Vend* claimed, and the district court found, that an injunction under § 16 of the Clayton Act is "expressly authorized by Act of Congress." 403 F. Supp. at 536.

necessary in aid of [the federal court's] jurisdiction,³¹ or to protect or effectuate [the federal court's] judgments."³²

It is this more detailed statute that the Court had to consider in *Vendo*. Justice Rehnquist, writing the opinion of the Court, dealt primarily with the "expressly authorized" exception of section 2283, which he held inapplicable.³³ Justice Rehnquist recognized that a statute need not refer to either section 2283 or a state court proceeding to qualify as an exception. He observed, however, that the statutes that have been held exceptions "necessarily interact with or focus upon, a state judicial proceeding."³⁴ The removal process, for example, stays state court proceedings by its very nature.³⁵ Section 16, by contrast, merely extends to private parties the right to seek injunctive relief against antitrust violations; it in no way "focuses" upon state court actions.³⁶

This requirement of "focus" is closely connected with the test for an

31. 28 U.S.C. § 2283 (1970) (footnote added). The Reviser's Note indicates that this second exception allows injunctions in connection with the removal of actions to federal courts. *Id.*, Reviser's Note. Justice Rehnquist had a different theory; he cited C. WRIGHT, *supra* note 23, § 47, at 204, to support his contention that this exception refers to the in rem exception. 97 S. Ct. at 2892.

In *Capital Serv., Inc. v. NLRB*, 347 U.S. 501 (1954), the Supreme Court held that the "necessary in aid of jurisdiction" exception allowed an injunction "where Congress . . . has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions." *Id.* at 504. Accordingly, the employer was enjoined by the federal court from enforcing a state court injunction of union activity, clearly not an in rem action. The Supreme Court again addressed the jurisdiction exception in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). "[I]t is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction." *Id.* at 295. The exception implies "that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.* As in *Capital Service*, the case involved the enjoining of union activity, certainly not a situation involving the in rem exception.

32. 28 U.S.C. § 2283 (1970). The third exception is designed to prevent relitigation in state courts of issues already resolved in federal courts—the situation involved in the *Toucey* case. C. WRIGHT, *supra* note 23, § 47, at 204.

33. 97 S. Ct. at 2893. Rehnquist also held that the injunction could not be sustained on § 2283's second exception—that the injunction was necessary in aid of the district court's jurisdiction. Rehnquist suggested that this language refers only to in rem actions. *Id.* at 2892. The Supreme Court, however, has used the exception to allow injunctions of in personam actions. *See* note 31 *supra*. Nevertheless, Justice Rehnquist is probably correct in his conclusion that the facts of the case do not warrant application of the exception. Even if collection of the state court judgment were to reduce the corporate plaintiffs to *Vendo* satellites, Harry Stoner as an individual plaintiff could preserve the case or controversy, and the court's jurisdiction would be intact.

34. 97 S. Ct. at 2892.

35. While traditionally the removal of a case from state to federal court stayed all proceedings in the state court, 28 U.S.C. § 1446(e) (1970), in 1977 the statute was amended to provide in the case of criminal prosecutions that the state court proceeding can continue, but no judgment of conviction may be entered unless, and until, the federal court denies the removal petition. Act of July 30, 1977, Pub. L. No. 95-78, § 3, 91 Stat. 320 (codified at 28 U.S.C.A. § 1446(c)(3) (West Supp. Pamphlet No. 3 1977)).

36. 97 S. Ct. at 2888.

expressly authorized exception developed in *Mitchum v. Foster*.³⁷ The *Mitchum* Court held that 42 U.S.C. § 1983³⁸ is an expressly authorized exception under section 2283. The test articulated by that Court "is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."³⁹ The Court in *Mitchum* relied on the legislative history of section 1983, which clearly showed congressional concern that state courts would be used to deprive citizens of their federally protected rights.⁴⁰ Because this concern was a basic factor in the enactment of section 1983, the Court found that that provision could realize its "intended scope" only if federal courts held injunctive power over state court actions that violate it.⁴¹

Because Congress was not overtly concerned with state court proceedings as violative of the Sherman Act when it enacted section 16 of the Clayton Act, Justice Rehnquist denied the existence of an exception on the ground that "[t]he critical aspects of the legislative history . . . are wholly absent This void is not filled by other evidence of congressional authorization."⁴² Rehnquist rejected the possibility that the strong congressional policy and national interest in enforcing the antitrust laws could conceivably fill the void.⁴³ He instead maintained that "the importance of the federal policy to be 'protected' by the injunction is not the focus of the inquiry."⁴⁴ Citing two earlier Supreme Court cases,⁴⁵ he warned that section 2283 is not a principle of comity and federalism that allows federal courts to balance federal and state interests, but a strict prohibition to be guarded from judicial improvisation.⁴⁶

In the first of the cases cited by Rehnquist, *Amalgamated Clothing Workers of America v. Richman Brothers Co.*,⁴⁷ Justice Frankfurter, writing for the Court, held that a district court could not restrain a state court from enjoining a labor union engaged in peaceful picketing.⁴⁸ Frankfurter

37. 407 U.S. 225 (1972).

38. 42 U.S.C. § 1983 (1970) (originally enacted as Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13).

39. 407 U.S. at 238.

40. *Id.* at 240-42 (citing CONG. GLOBE, 42d Cong., 1st Sess. 361, 374-76, 385, 416, 429, 653 (1871)).

41. *Id.* at 242-43.

42. 97 S. Ct. at 2888-89.

43. *Id.* at 2889.

44. *Id.*

45. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970); *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511 (1955).

46. 97 S. Ct. at 2893.

47. 348 U.S. 511 (1955).

48. The Court recognized that the state court had intruded into the federal domain created by the Taft-Hartley Act. The suit, however, was brought by the union, a private party, and therefore did not qualify as an express exception. *Id.* at 517. Section 101, § 10(j), (l) of the

rejected the union's argument that the section 2283 bar applied only to cases in which the state and federal courts have concurrent jurisdiction, finding the "[l]egislative policy . . . expressed in a clear-cut prohibition qualified only by specifically defined exceptions."⁴⁹ As section 2283 did not specifically list exclusive federal jurisdiction as one of its exceptions, the prohibition against injunctions applied.⁵⁰

The second case Justice Rehnquist relied on, *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,⁵¹ also involved a labor dispute. Again the Court denied federal power to restrain a state court injunction against union picketing. Justice Black reiterated the Court's position—a federal court may not interfere in a state court action “merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear.”⁵² The Court rejected the contention that the Act merely establishes a principle of comity; any injunction against state court proceedings had to be based on a section 2283 exception.⁵³

Justice Stevens, speaking for the dissenters in *Vendo*, distinguished that case from *Atlantic Coast Line* and *Richman* on the ground that neither considered an allegation of an exception expressly authorized by act of Congress.⁵⁴ Stevens was not trying to create an extrastatutory exception based on the importance of federal antitrust policy, the sort of judicial improvisation condemned by *Atlantic Coast Line* and *Richman*. Instead, he argued that the language and history of the Clayton Act warrant a holding that an injunction against state court action under section 16 is expressly authorized by act of Congress, and is thus an exception included within the language of section 2283.⁵⁵

The Supreme Court has interpreted the antitrust laws to evidence a congressional desire for strong enforcement against violations in whatever guise.⁵⁶ Stevens contended that this policy, coupled with the grant of federal injunctive power in section 16,⁵⁷ constitutes an expressly authorized exception.⁵⁸ The language of the Sherman Act defining violations is deliberately vague and intended to include “every conceivable act which could possibly

Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 160(j), (l) (1970), authorizes injunctive relief only at the request of the NLRB.

49. 348 U.S. at 515-16.

50. *Id.* at 515-18.

51. 398 U.S. 281 (1970).

52. *Id.* at 294.

53. *Id.* at 286-87.

54. 97 S. Ct. at 2899 n.23 (Stevens, J., dissenting).

55. *Id.* at 2894-98.

56. *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911).

57. See note 3 *supra*.

58. 97 S. Ct. at 2896-98 (Stevens, J., dissenting).

come within the spirit or purpose of the prohibitions of the law,"⁵⁹ whether or not the form of restraint was actually contemplated by Congress. From this basis, Stevens reasoned that section 16 allows injunctions against "violations of the Sherman Act," it has been judicially established that state court actions may be such violations,⁶⁰ and therefore section 16 allows injunctions against state court actions.⁶¹ Stevens also maintained that the statute qualifies as an exception under the *Mitchum* test.⁶² Section 16 was enacted to give private citizens an antitrust remedy before a violation produces irreparable harm.⁶³ This "intended scope" will be defeated unless the federal courts can restrain state court actions such as the Illinois action in *Vendo* that cause such harm in violation of the Sherman Act.⁶⁴

Justice Stevens was accurate in his observation that neither *Richman* nor *Atlantic Coast Line* dealt with situations involving the "expressly authorized" exception to section 2283. The broad holding of both opinions was that if an injunction cannot be classified under one of the stated exceptions (as exclusive federal jurisdiction could not in these cases), the prohibition is absolute.⁶⁵ These cases, however, should not be summarily

59. *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911).

60. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509 (1972) ("concerted action . . . to institute state and federal proceedings to resist and defeat applications . . . to acquire operating rights"); *United States v. Otter Tail Power Co.*, 360 F. Supp. 451, 451 (D. Minn. 1973) ("repetitive use of litigation . . . timed and designed principally to prevent the establishment of municipal electric systems and thereby preserve defendant's monopoly").

61. 97 S. Ct. at 2898 (Stevens, J., dissenting).

62. *Id.* at 2899-901; *see text accompanying notes 37-39 supra*.

63. 97 S. Ct. at 2900.

64. *Id.*

65. *But see Younger v. Harris*, 401 U.S. 37, 46 (1971) (recognizing that federal intervention may be appropriate if the state court action is in bad faith, for the purposes of harassment and threatens irreparable harm that is "both great and immediate" through violation of the defendant's constitutional rights (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926))). Justice Stewart in his *Mitchum* decision noted the inconsistency of *Younger* with *Atlantic Coast Line* and held that the portion of *Younger* recognizing an exception when the state court action threatens constitutional rights would have to be overruled if § 1983 were not "expressly authorized." 407 U.S. at 231; *see text accompanying notes 37-41 supra*.

A second extrastatutory exception was established by the Supreme Court in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), and reaffirmed in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). Both cases allowed an injunction of state court actions when the United States as sovereign is the party seeking injunctive relief. The *Leiter* court upheld the injunction on the ground that when the United States seeks a stay to prevent injury to a national interest, there is less danger of state-federal conflict than there is when a private party is plaintiff. 352 U.S. at 225-26. *Nash* extended "sovereignty" to the NLRB as a public agency acting in the public interest—the chosen instrument of protection. The rationale for this extension was that § 2283's purpose is not "the frustration of federal systems of regulation." 404 U.S. at 146.

In *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966), the Second Circuit held that the *Leiter/Nash* implied sovereignty exception should make the § 2283 bar inapplicable when the federal action is based on a federal statute designed to protect the public sector through the creation of private claims for relief. *Id.* at 697-98. The *Studebaker* court allowed an injunction under § 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(u)(e) (Supp. V 1975); the court implied that the same result would be reached if the federal action were based on § 16 of the Clayton Act. 360 F.2d at 698; *cf. Tampa Phosphate R.R. v. Seaboard Coast Line R.R.*, 418

dismissed as totally inapplicable to the *Vendo* case. Together with *Mitchum*, they are the most important indications of the Court's interpretation of the 1948 amendment of section 2283, and their tone is restrictive. Dictum in *Atlantic Coast Line* indicates that that Court was also concerned with unwarranted expansion of the three exceptions beyond the scope of Congress' intent.⁶⁶

Section 16 can, nevertheless, reasonably be found to be within the scope of the section 2283 "expressly authorized" exception. Since 1793, the Supreme Court has been more willing to except federal statutes from section 2283's prohibition than Justice Rehnquist's requirement of "focus" suggests, a tradition continued by *Mitchum*. Six statutes⁶⁷ were "implied exceptions" before *Toucey*, and were retained even by that restrictive opinion.⁶⁸ After the *Toucey* decision, the Supreme Court in two cases⁶⁹ established a seventh statutory exception—the Emergency Price Control Act,⁷⁰ which, as Justice Rehnquist conceded, does not "focus" on a state court action.⁷¹

The 1948 revision of section 2283 was not meant to restrict these exceptions, but rather to return the law to the more liberal interpretations of the pre-*Toucey* decisions.⁷² Furthermore, the 1948 revision, as evidenced by *Mitchum*, was not meant to restrict statutory exceptions to those already recognized. The *Mitchum* Court's basis for finding section 1983 to be an express exception was the legislative intent and history behind the statute;⁷³ the history of the Clayton Act provides a similar basis.

In 1914, Congress reaffirmed its commitment to strict enforcement of the antitrust laws with the passage of the Clayton Act.⁷⁴ Section 16 expressly granted federal injunctive relief to private citizens to allow them to protect themselves from violations of the Sherman Act before suffering financial ruin.⁷⁵ Congress may not have been specifically concerned with state court

F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (same result and reasoning under the Interstate Commerce Act, ch. 104, pt. 1, § 1, 24 Stat. 379 (1887) (formerly codified, as amended, at 49 U.S.C. § 1(20) (1970)) (repealed 1976)).

Justice Stevens observed that United States Attorneys acting under the Sherman Act can ask for injunctions against violations, including state court actions. As the Clayton Act was to extend to private parties the same litigation powers possessed by the government, it is an expressly authorized exception. 97 S. Ct. at 2896 nn.9 & 10 (Stevens, J., dissenting).

66. 398 U.S. at 287.

67. See note 23 *supra*.

68. See 314 U.S. at 139.

69. *Porter v. Dicken*, 328 U.S. 252 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944).

70. Ch. 26, § 205(a), 56 Stat. 23 (1942). The act authorized the Price Administrator to apply to the "appropriate court" for an injunction against "any acts or practices which constitute or will constitute a violation of any provision . . . of this Act." *Id.*

71. 97 S. Ct. at 2892 n.10.

72. See note 29 *supra*.

73. 407 U.S. at 242.

74. Ch. 323, 38 Stat. 730 (1914).

75. 97 S. Ct. at 2897 n.11 (Stevens, J., dissenting).

actions as violations, but, as subsequent case law recognized, Congress deliberately defined Sherman Act violations generally to cover all attempts at circumvention of the Act's prohibitions.⁷⁶ Congress intended its grant of private federal injunctive relief to be broad enough to curtail all attempts to restrain trade illegally. To limit this relief by holding the section 2283 bar applicable to section 16 would infringe on the intended scope of the statute; thus, section 16 appears to satisfy the *Mitchum* test and should qualify as an expressly authorized exception to section 2283.

Although plaintiffs lost their injunction, *Vendo's* impact will not seriously weaken the antitrust laws; a majority of the justices held that section 16 is an express exception under section 2283.⁷⁷ Nor should the decision cause state courts to fear a steady stream of encroachments on their freedom from review by federal district courts; the opinion advocating the exception focused on the unique nature of the antitrust laws.⁷⁸ The *Vendo* decision does, however, raise the question of the continuing usefulness of section 2283, particularly in its present form, as a mechanism for preventing needless friction between state and federal courts.

The likely effect of the decision is to allow Lektro-Vend's probably meritorious⁷⁹ antitrust claim to go unheard. In issuing its injunction, the district court was not attempting to review the decision of the Illinois Supreme Court; the injunction was issued to temporarily restrain collection of the judgment against Lektro-Vend to allow the company sufficient independence and financial resources to press its antitrust claim.⁸⁰ Denying the federal courts the latitude to hear a complaint grounded on a matter within exclusive federal jurisdiction for the sake of immediate enforcement of a state court judgment seems to be an inappropriate method of avoiding conflict between the two judicial systems.

Justice Rehnquist refused to balance the importance of the federal policies behind the Anti-Injunction Act and the antitrust laws, stating that Congress, in enacting section 2283, reserved this judgment for itself.⁸¹ His refusal, although supported by the language of *Atlantic Coast Line* and *Richman*⁸² and a fair reading of the language of section 2283, is founded on a uniquely inflexible interpretation of the statute. Even Justice Frankfurter, author of the *Toucey* and *Richman* opinions, was willing to allow an extra-statutory exception, when he recognized the implied sovereignty exception.⁸³

76. See *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911).

77. See note 19 *supra*.

78. 97 S. Ct. at 2895-901 (Stevens, J., dissenting).

79. *Lektro-Vend Corp. v. Vendo Co.*, 403 F. Supp. at 532.

80. See *id.* at 535.

81. 97 S. Ct. at 2891.

82. See text accompanying notes 47-53 *supra*.

83. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957). The exception was not

In addition, Congress, by allowing exceptions to its original flat prohibition,⁸⁴ recognized that there are federal policies that supersede that of the Anti-Injunction Act. The question is whether the determination of what these policies are is strictly reserved to Congress. The Reviser's Note indicates that section 2283 was amended to restore the state of the law to the more liberal pre-*Toucey* era.⁸⁵ If this was indeed Congress' intention, the language of the statute enumerating acceptable exceptions and the Court's conclusion that these exceptions are to be construed narrowly, may have circumvented it. The language of the statute was tailored to one restrictive Supreme Court decision and was intended to expand rather than contract allowable section 2283 exceptions.⁸⁶ A literal reading of the language of section 2283, particularly in light of *Atlantic Coast Line* and *Richman*, has not led to this result.⁸⁷

The strongest protection the states have against federal interference with their judicial proceedings is the self-restraint federal courts exercise in deference to the concept of federalism.⁸⁸ During the early years of the judiciary's growth, the Anti-Injunction Act may have been necessary to define the state-federal judicial relationship and to emphasize to the federal court judges that they were not to attempt any review function over state court proceedings. The Act has served its purpose. Federal courts generally recognize that even when an injunction is permissible under section 2283, the court must determine whether such an injunction would violate general principles of comity and federalism.⁸⁹

The Anti-Injunction Act was revised by Congress in 1948 and must be adhered to by the federal courts. It is questionable, however, how effective the provision is in its function of preserving state-federal relations. Justice Frankfurter called section 2283 "continuing evidence of [Congress'] confidence in the state courts . . . to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction."⁹⁰ State-

only reaffirmed, but extended after the *Atlantic Coast Line* decision. *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); see note 65 *supra*.

84. See note 22 and accompanying text *supra*.

85. See note 29 *supra*. See also Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1169 (1932). The authors concluded that at the time they were writing, the Anti-Injunction Act provided no more protection to state court independence than did recognized principles of comity and federalism. They evidenced no sense of alarm or impropriety at this state of affairs.

86. See note 29 *supra*.

87. See text accompanying notes 47-53 *supra*.

88. Between 1793 and 1941 the federal courts found it necessary to except only six federal statutes from the prohibition. See note 23 and accompanying text *supra*.

89. See, e.g., *Mitchum v. Foster*, 407 U.S. 225 (1972); *Younger v. Harris*, 401 U.S. 37 (1971); *Response of Carolina v. Leasco Response, Inc.*, 498 F.2d 314 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974); *Red Rock Cola Co. v. Red Rock Bottlers, Inc.*, 195 F.2d 406 (5th Cir. 1952); *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

90. *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. at 518-19.

federal relations would have been spared the confines of the strained construction of section 2283 if Congress had evidenced the same confidence in the federal courts.

MARY BROOKE LAMSON

Prisoners' Rights—*Bowring v. Godwin*: The Limited Right of State Prisoners to Psychological and Psychiatric Treatment

According to statistics compiled by the American Correctional Association, between fifteen and twenty percent of the prisoner population in the United States suffers from a diagnosable emotional or mental disturbance, including neuroses, personality and behavioral disorders, and various pre-psychotic and psychotic conditions.¹ And yet, historically, the vast majority of these prisoners have remained untreated due to an inadequacy of staff and facilities,² as well as a general apathy towards the mental health of convicted criminals.³ In *Bowring v. Godwin*,⁴ the United States Court of Appeals for the Fourth Circuit expressly held that in certain narrowly defined situations there is a definite nexus between the constitutional right of a prisoner to be spared from cruel and unusual punishment⁵ and his right to receive psychological and/or psychiatric treatment.⁶ According to the court, however, not

1. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 441 (3d ed. 1966). See also *Newman v. Alabama*, 503 F.2d 1320, 1324 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Alexander, *The Captive Patient: The Treatment of Health Problems in American Prisons*, 6 CLEARINGHOUSE REV. 16 (1972) (persons entering the federal prison system have a 5% chance of severe psychiatric disturbance and 15% chance of serious emotional disability).

2. See, e.g., AMERICAN MEDICAL ASSOCIATION, MEDICAL CARE IN U.S. JAILS (1972), reprinted in ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, MEDICAL AND HEALTH CARE IN JAILS, PRISONS, AND OTHER CORRECTIONAL FACILITIES 67 (3d ed. 1974); ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972); SOUTH CAROLINA DEP'T OF CORRECTIONS, SUMMARY OF SYSTEM AND ARRANGEMENTS FOR DELIVERY OF MEDICAL SERVICES IN SOUTH CAROLINA CORRECTIONAL SYSTEM (1974), reprinted in ABA COMM. ON CORRECTIONAL FACILITIES AND SERVICES, *supra* at 263.

3. See Morris, "Criminality" and the Right to Treatment, 36 U. CHI. L. REV. 784 (1969); Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7 (1972). Behavior modification has received the most attention in recent years as a form of treatment. This treatment is intended to conform behavior patterns to a socially acceptable norm, not to discover and combat the root causes of mental illness. See O'Brien, *Tokens and Tiers in Corrections: An Analysis of Legal Issues in Behavior Modification*, 3 NEW ENGLAND J. PRISON L. 15 (1976).

4. 551 F.2d 44 (4th Cir. 1977).

5. U.S. CONST. amend. VIII in pertinent part provides: "[N]or [shall] cruel and unusual punishments [be] inflicted."

6. 551 F.2d at 47-48.